

1 JOSEPH P. RUSSONIELLO (CSBN 44332)
United States Attorney

2 BRIAN STRETCH (CSBN 163973)
Chief, Criminal Division

4 MARK L. KROTOSKI (CSBN 138549)
SUSAN KNIGHT (CSBN 209013)
5 Assistant United States Attorneys

6 1301 New York Avenue, Suite 600
Washington, D.C. 20530-0016
7 Telephone: (202) 307-6389
Facsimile: (202) 514-6113
8 E-Mail: Mark.Krotoski@usdoj.gov

9 Attorneys for Plaintiff

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

14 UNITED STATES OF AMERICA,) No. CR 08-00423 JF
15 Plaintiff,) GOVERNMENT'S SENTENCING REPLY
16 v.) MEMORANDUM
17 ATUL MALHOTRA,) Date: December 18, 2008
18 Defendant.) Time: 11:00 a.m.
19) Judge: Hon. Jeremy Fogel

20 Consistent with Local Rule 32-5, the government respectfully files this Sentencing Reply
21 Memorandum in response to the Defendant's Revised Sentencing Memorandum (filed Dec.10,
22 2008).

23 As before, the government once again asks the Court to apply the stipulated Sentencing
24 Guidelines from the plea agreement. The government believes the requested probationary
25 sentence is inappropriate based on the facts of this case. Such a sentence would sent the wrong
26 message that a company vice president may with impunity steal trade secrets and other materials
27 from his employer and avoid sufficient punishment.

28 Government's Sentencing Reply Memorandum
CR 08-00423 JF

1 Surprisingly, the defense makes an unfounded claim that the government has failed to
2 follow the terms of the plea agreement. The claim lacks any support. At all times, the
3 government has urged the Court to apply the Sentencing Guidelines in the plea agreement.

4 The government has noted that under an explicit provision of the plea agreement, the
5 defendant's acceptance of responsibility expressly remains conditioned on the defendant's
6 continued acceptance of responsibility through sentencing. The Plea Agreement signed by the
7 defendant provides:

8 “If I meet the requirements of U.S.S.G. § 3E1.1, I may be entitled to a two-level reduction
9 for acceptance of responsibility, provided that I forthrightly admit my guilt, cooperate
10 with the Court and the Probation Office in any presentence investigation ordered by the
Court, and continue to manifest an acceptance of responsibility *through and including the*
time of sentencing.” (Emphasis added.)

11 This conditional language merely notes the continuing obligation of the defendant. It remains as
12 a determination the Court will have to make during the sentencing hearing.¹

13 After reviewing the present papers, including the defendant's letter to the Court, the
14 government now requests that the two level reduction be applied in this case (assuming the
15 defendant continues to demonstrate acceptance of responsibility through the sentencing hearing
16 as required under the terms of his plea agreement).

17 However, the government will seek to address the relevant Section 3553(a) factors during
18 the hearing. The government believes there are a number of defense inaccuracies concerning the
19 scope of the defendant's conduct, the value of the misappropriated trade secret, and the
20 defendant's efforts concerning the trade secret that the government would like to have an
21 opportunity to note at the hearing before the sentence is imposed. For example, while the

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23 ¹ This conditional acceptance of responsibility language is standard and has been used in
most plea agreements in the Northern District of California for several years. *See also U.S. v.*
24 *Adams*, 197 F.3d 1221, 1223 (8th Cir. 1999) (“We also conclude that the government did not
breach the plea agreement because the acceptance-of-responsibility recommendation was
25 conditioned upon Adams exhibiting conduct consistent with acceptance of responsibility, and the
agreement reserved to the government the discretion to void the agreement if Adams engaged in
26 any further criminal activity.”).

1 defense notes that the plea agreement was focused on one trade secret, it is relevant that the
2 defendant misappropriated other matters involving confidential information belonging to IBM
3 and willingly shared them with his new employer.

4 In the defense materials, former defense counsel has filed a declaration. Surprisingly, the
5 declaration contains a number of inaccuracies and takes settlement statements out of context.
6 More importantly, former defense counsel, who was conflicted out of the case, refers to
7 discussions that were expressly understood to be settlement discussions and were protected under
8 Fed. R. Evid. 410, and other applicable authorities. It would be inappropriate for government
9 counsel to breach this agreement, even if defense counsel feels comfortable doing so. Therefore
10 any response, if necessary, can be addressed at the sentencing hearing.

11 Finally, under an Interim Protective Agreement signed by the parties in October 28, 2008,
12 at the “conclusion of” the case, the “defense agree[d] to return all Confidential Material to the
13 United States” The government has requested that the defendant return all Confidential
14 Material, including all Digital Media, to the government. The government will request this
15 property be returned at the sentencing hearing.

16 Dated: December 12, 2008

JOSEPH P. RUSSONIELLO
United States Attorney

17 /s/

18 MARK L. KROTOSKI
19 Assistant United States Attorney

20 /s/

21 SUSAN KNIGHT
22 Assistant United States Attorney

CERTIFICATE OF SERVICE

1 **UNITED STATES v. ATUL MALHOTRA,**

2 NO. CR 08-00423 JF

3 I, Susan Kreider, declare that I am a citizen of the United States, over the age of 18 years
4 and not a party to the within action.

5 I hereby certify that a copy of the foregoing:

6 **GOVERNMENT'S SENTENCING MEMORANDUM**

7 was served today ____ by hand; ____ by facsimile; ____ by Federal Express; by
8 first class mail by placing a true copy of each such document(s) in a sealed envelope with postage
9 thereon fully paid, either in a U.S. Mail mailbox or in the designated area for outgoing U.S. Mail
10 in accordance with the normal practice of the United States Attorney's Office; ____ by placing in
11 the Public Defender's pickup box located in the Court Clerk's Office.

12 Ms. Christina Carrubba
13 United States Probation Officer
14 United States Probation Office
15 Northern District of California
16 450 Golden Gate Avenue, Seventeenth Floor
17 Box 36060
18 San Francisco, CA 94102
19 Fax (415) 436-7572

20 Thomas J. Nolan, Esq.
21 Nolan Armstrong, LLP
22 600 University Ave
23 Palo Alto, CA, 94301
24 Fax(650) 326-9704

25 I declare under penalty of perjury that the foregoing is true and correct, and that this
26 certificate was executed at San Jose, California

27 DATED: December 12, 2008

28 _____
29 SUSAN KREIDER
30 Legal Assistant